February, 1994

HONOR ROLL

410th Session, Basic Law Enforcement Academy - September 29 through December 22, 1993

President:	*Officer Kim E. Miller - Washougal Police Department*
Best Overall:	*Deputy Christopher McMillan - Clark County Sheriff's Department*
Best Academic:	*Deputy Christopher McMillan - Clark County Sheriff's Department*
Best Firearms:	*Officer Stephen G. Shepard - Tacoma Police Department*
Best Night Mock Scene:	*Officer Arnold E. Gonzales - Quincy Police Department*

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Corrections Officer Academy - Class 189 - November 8 through December 10, 1993

Highest Overall:	*Officer Kevin J. Kelly - Washington Corrections Ctr for Women*
Highest Academic:	*Officer Melida A. Clark - Washington Corrections Ctr for Women*
Highest Practical Test:	*Officer Kevin J. Kelly - Washington Corrections Ctr for Women*
	Officer James Mateljak - Pierce County Jail
	Officer Chad L. Spaetig - Snohomish County Corrections
Highest in Mock Scenes:	*Officer William H. Livingston - Clallam Bay Corrections Center*
Highest Defensive Tactics:	*Officer Kevin J. Kelly - Washington Corrections Ctr for Women*

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Corrections Officer Academy - Class 190 - November 8 through December 10, 1993

Highest Overall:	*Officer Richard M. Smith - McNeil Island Corrections Center*
Highest Academic:	*Officer Linda L. Norvell - Cowlitz County Jail*
Highest Mock Scenes:	*Officer Shannon B. Phillips - Benton County Corrections*
Highest Practical Testing:	*Officer Philip S. Sadlier - Pierce County Jail*
Highest Defensive Tactics:	*Officer Kenneth J. Lane - Washington Corrections Ctr for Women*

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FEBRUARY LED TABLE OF CONTENTS

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NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

CAMPER IN TENT LAWFULLY ON CAMPSITE AT STATE PARK HAS REASONABLE EXPECTATION OF PRIVACY WHEN INSIDE CLOSED TENT; NO EXIGENCY FOR ENTRY

U.S. v. Gooch, 6 F.3d 673 (9th Cir. 1993)

Facts: (Excerpted from Court of Appeals' decision)

> At about 3:50 a.m., a woman called the Stevens County Sheriff's office on behalf of Marc Cole, who claimed a man had shot at him at the state campground. Two officers responded. As they neared the campsite, they observed a vehicle leaving the campsite. The occupants told the officers that Gooch was "hurting people" at the campground and that shots had been fired. Closer to the campground, the

officers encountered Marc Cole. Cole said Gooch had fired a shot in his direction after a fight in which Gooch tried to "stick [Cole's] head into the fire." These incidents occurred between midnight and 2:00 a.m.

The officers arrived at the entrance to the campground at approximately 5:00 a.m. and then waited some time for the arrival of another deputy and a reserve officer. It was daylight by this time. Three officers then headed down the entrance road to the campsite itself, a distance of approximately one mile. On the way, they encountered a young man, who told them Gooch was in his tent with a woman. Gooch had been living in the tent for several days; he had no other residence.

The officers, without seeking an arrest warrant, ordered Gooch out of the tent, patted him down, and arrested him. He was handcuffed and locked in the patrol car 20 yards from the tent. The officers then ordered the other occupant of the tent, Mary Baker, out of the tent. The district court found that the officers then talked to other campers for about 15 minutes. The other campers were not obstructive or threatening, nor was there any indication that they had been involved in the criminal activity.

Still lacking a warrant, the officers searched the tent for the firearm. One of them found a loaded handgun under Gooch's air mattress in the tent.

After dismissal of state charges, a federal indictment for being a felon in possession of a firearm was then returned. A jury convicted Gooch of the federal charge. Gooch timely moved for judgment of acquittal and for a new trial. Gooch also filed a § 2255 petition for habeas corpus in which he claimed ineffective assistance of counsel in that his counsel had failed to move to suppress the firearm. The district court held a post-trial suppression hearing and determined that the firearm, along with the holster and ammunition, should have been suppressed and that the warrantless arrest was invalid. The district court determined that Gooch had a reasonable expectation of privacy in the tent which was protected under the Fourth Amendment, that there were no "exigent circumstances," and that even if the arrest was lawful, the search was not a valid search incident to arrest.

[Footnote, some text omitted]

ISSUES AND RULINGS: (1) Did Gooch have a reasonable expectation of privacy in his tent? (ANSWER: Yes); (2) Did the arrest of Gooch occur in a "public place" such that a warrantless arrest was lawful under the Payton rule? (ANSWER: No); (3) Were the officers confronted by exigent circumstances which justified their warrantless entry of the tent, or its equivalent (ordering Gooch out) to arrest him? (ANSWER: No); (4) Were the officers confronted by exigent circumstances after arresting Gooch such that their search of the tent for the gun was justified? (ANSWER: No). Result: Eastern Washington District Court judgment of acquittal affirmed.

ANALYSIS:

(1) Did Gooch Have Reasonable Expectation of Privacy In Tent?

The Court of Appeals rejects the government's theory that the Fourth Amendment's "Carroll

(probable cause car search) Doctrine" should be applied to tents. **[LED EDITOR'S NOTE: Under State v. Ringer, 100 Wn.2d 686 (1983) Feb. '84 LED:01 the Carroll Doctrine does not apply under the Washington Constitution, so the analogy attempted by the Federal prosecutor in Gooch would have failed for this independent reason if this had been a state prosecution in Washington.]** The Court gives several reasons for rejecting the "Carroll Doctrine" analogy, including the following:

> The government would have us compare Gooch's case to those involving mobile motor homes, in which a person has a reduced expectation of privacy. The fact that a tent may be moved, alone, is not enough to remove the Fourth Amendment protections. As noted above, tents are protected under the Fourth Amendment like a more permanent structure. Also, a tent is more analogous to a (large) movable container than to a vehicle; the Fourth Amendment protects expectations of privacy in movable, closed containers. Besides, the reduced expectation of privacy in a vehicle is due in large part to the fact that there is "pervasive" government regulation of vehicles. Finally, even the automobile exception applies only when a vehicle is on the open road or is capable of movement and is "in a place not regularly used for residential purposes -- temporary or otherwise." The district court did not err in concluding a tent is more like a house than a car. We hold that Gooch had a reasonable expectation of privacy such that the warrantless search of his tent violated the Fourth Amendment.

[Some citations omitted]

(2) Was The Tent A Public Area Under Payton's Entry-To-Arrest Rule?

In **Payton v.New York, 445 U.S. 573 (1980)** the U.S. Supreme Court held that police may not enter a person's own residence (or order him out) to arrest him unless: (1) police obtain consent to enter, or (2) there are exigent circumstances, or (3) they have an arrest warrant plus reason to believe the arrestee is presently inside, or (4) they have a search warrant. In U.S. v. Steagald, 451 U.S. 204 (1981) the U.S. Supreme Court held that police may not enter a person's residence to arrest a non-resident inside unless: (1) police obtain consent to enter, (2) there are exigent circumstances, or (3) police have a search warrant.

The Gooch Court's analysis on the Payton/Steagald entry-to-arrest issue is in part as follows:

> No warrant is required to arrest a suspected felon in a public place. Absent exigent circumstances, a warrantless arrest *is* unconstitutional in a "non-public" place, even when that place is not one's residence. . . .
>
> Though Gooch's tent was pitched on public property, we hold that the closed tent was a "non-public" place for purposes of Fourth Amendment analysis. We have recognized that, despite the special status afforded a residence under the Fourth Amendment, "an individual's privacy interests may be implicated in a variety of other settings." By establishing a campground, the state created a situation where campers were invited to come to set up a tent. The campers could reasonably assert a legitimate, though temporary, interest in their privacy even in this short-term "dwelling." A guest in Yellowstone Lodge, a hotel on government park land, would have no less reasonable an expectation of privacy in his hotel room than a

> guest in a private hotel, and the same logic would extend to a campsite where the opportunity is extended to spend the night.

[Text, some citations, footnote omitted]

(3) Did Exigent Circumstances Justify The Warrantless Entry-To-Arrest?

The Gooch Court's analysis of the exigent circumstances issue is in part as follows:

> Exigent circumstances are '"those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [or arrest] until a warrant could be obtained."' Exigent circumstances are present when "a reasonable person [would] believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."
>
> The exigencies cited by the government in justifying the arrest in this case were the risk that evidence would be destroyed and the potential danger to the officers and other campers. As the district court observed, there was "no independent indication" that the firearm would be destroyed, nor could it even be removed from the tent with the officers present.
>
> The district court found the risk of harm to the officers and others to present a closer issue. The facts that Gooch was intoxicated, that a firearm had been discharged recently, and that people were leaving the campground in fear supported the officers' conclusion that there was an immediate threat to public safety. However, there was no actual ongoing threat. The district court found that the campground appeared quiet when the officers arrived in the daylight hours. The alleged fight and discharge of the firearm took place several hours before the arrest. The district court did not err in concluding that the deputies could not have reasonably believed that there was a present danger to other occupants of the tent or to other campers.
>
> The government compares the circumstances here to those in Al-Azzawy. In that case, we determined exigent circumstances existed on the sole basis that the police had been informed by a reliable person that the defendant possessed explosives. Al-Azzawy, 784 F.2d at 894. However, we expressly contrasted Al-Azzawy's circumstances with those addressed in United States v. Morgan, 743 F.2d 1158, 1161-1163 (6th Cir. 1994), cert denied, 471 U.S. 1061, 105 S.Ct. 2126, 85 L.Ed.2d 490 (1985). In Morgan, the court held that defendants' possession of automatic weapons did not give rise to exigent circumstances.

[Some citations omitted]

(4) Did Exigent Circumstance Justify The Post-Arrest Warrantless Search?

On the issue of whether exigent circumstances independently justified the post-arrest entry of the tent to search for the gun, the Gooch Court's analysis is as follows:

> The search was also not justified by exigent circumstances, as the district court found: "At the time of the search, the defendant was in custody, handcuffed, and locked in the back of a patrol car. He was not a danger to anyone, and he was the only one that the deputies had any reasonable grounds to believe had violated the law, or who could possibly have been a threat to them."
>
> The government argues the officers needed to search the tent immediately because the firearm presented a potential danger to the children at the campsite. The presence of a firearm alone is not an exigent circumstance. The cases cited by the government involved circumstances where unsupervised children would be left inside the house with the weapon or explosives if the officer did not secure it. In the instant case, no one remained in the tent at the time of the search. It would not have been difficult to prevent children or anyone else from entering the tent until a warrant was obtained. The government's argument logically would authorize any warrantless search where officers had reason to believe a firearm was involved.
>
> This was not a case in which one or two police officers were forced to react quickly in an inaccessible locale that could only be reached on foot for some distance. The officers drove directly to the campground, only one mile off the main road, in two vehicles. They parked just 20 yards from the tent. Three officers were present to arrest Gooch, with another as backup. There was no ongoing threat. We hold that no exigent circumstances existed.

[Citations omitted]

LED EDITOR'S COMMENT: We agree with the determination in Gooch that a camper lawfully on a state park campsite has a reasonable expectation of privacy while inside his enclosed tent. This is distinguishable from what is probably an unreasonable expectation of privacy for a trespassing camper may have. See State v. Cleator, 71 Wn. App. 217 (Div. I, 1993) Jan. '94 LED:17 (holding that a camper trespassing on private property did not have a legitimate objection to a police officer's warrantless peek inside his tent).

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WASHINGTON STATE SUPREME COURT

"INTIMIDATING A JUDGE" CONVICTION AFFIRMED; INTENT THAT THREAT BE COMMUNICATED TO JUDGE IS NOT AN ELEMENT OF CRIME OF INTIMIDATING JUDGE

State v. Hansen, 122 Wn.2d 712 (1993)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

> In January 1988, Michael Hansen was convicted of a felony and was sentenced to 24 months in prison by King County Superior Court Judge Robert Dixon. Several months after his release from prison, Hansen began contacting attorneys in order to bring a civil action against the State, Judge Dixon, and Hansen's defense attorney and the prosecutor from the earlier trial.

On March 6, 1990, Hansen telephoned Chris Youtz, an attorney whose name he had obtained from the Seattle-King County Bar Association Lawyer Referral Service, with the stated desire that Youtz would take his case. Hansen explained to Youtz that he felt he had been conspired against, calling the trial a "kangaroo court". During this discussion, Hansen identified by name the prosecutor and pubic defender, but did not name the judge. Youtz explained to Hansen that he would not take the case and that Hansen might want to seek another attorney with more experience in criminal law. At this point in the conversation, Hansen became upset. Hansen explained that Youtz was the third lawyer he had talked to about the possible action, and he stated that the bar was not helping out with his cause. Hansen then stated:

> When you say I am not going to get any help from the Bar, I am not going to get any help from anybody . . . What am I going to do . . . I am going to get a gun and blow them all away, the prosecutor, the judge and the public defender.

Youtz continued to talk to Hansen and finally explained to Hansen that there was nothing else he could do for him.

Youtz, concerned about the "serious threat" that Hansen had made, consulted with a Washington State Bar Association representative and his law partner as to whether it was proper to disclose what Hansen had communicated to him. In order to determine the name of the threatened judge, Youtz contacted the named prosecutor and described his conversation with Hansen. The prosecutor informed Youtz that it was Judge Dixon who had heard the case. Upon learning the judge's identity, Youtz telephoned Judge Dixon and discussed with him what had taken place. Youtz testified during the trial that he "was convinced that some action very well could be taken against these individuals, the prosecutor, the judge and the public defender, and that I was -- it was that concern that helped me call them and warn them."

The Seattle Police Department conducted an investigation and subsequently arrested Hansen and charged him with the crime of intimidating a judge under RCW 9A.72.160. Hansen was convicted of intimidation of a judge and was sentenced to 24 months in prison. Hansen appealed this conviction, contending the trial court erred in its application of RCW 9A.72.160.

The Court of Appeals affirmed the trial court's conviction. State v. Hansen, 67 Wn. App. 511 (1992) [Feb. '93 LED:15]. In affirming the trial court's conviction, the Court of Appeals interpreted RCW 9A.72.160 to mean that an individual who threatens a judge does so with the intention or knowledge that the threat will reach the judge. The court found that there was sufficient evidence that Hansen had this intent when he made the threat. The Court of Appeals also held that the attorney-client privilege did not apply.

ISSUES AND RULINGS: (1) Does the intimidating a judge statute require proof of intent that a threat against the judge be communicated to the judge? (ANSWER: No, rules a 5-4 majority); (2) Was there sufficient evidence to support Hansen's "intimidating" conviction? (ANSWER: Yes); (3) Should attorney Youtz's testimony about the threat have been barred under the attorney-client

privilege? (ANSWER: No) Result: affirmance of Court of Appeals' decision affirming King County Superior Court conviction for intimidating a judge.

ANALYSIS:

(1) Mental State

The majority's analysis of the mental state issue is as follows:

> At issue in this case is the interpretation of RCW 9A.72.160(1). RCW 9A.72.160 provides that:
>
> > (1) A person is guilty of intimidating a judge if a person *directs a threat to a judge because of a ruling or decision of the judge in any official proceeding,* or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.
> >
> > (2) "Threat" as used in this section means:
> >
> > (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
> >
> > (b) Threats as defined in RCW 9A.04.110(25).
> >
> > (3) Intimidating a judge is a class B felony.
>
> [Court's emphasis.]
>
> In its interpretation of RCW 9A.72.160, the Court of Appeals focused on the language "directs a threat to a judge" from subsection (1) of RCW 9A.72.160. The court noted that a definition of "directs" was absent from the statute. Using the definition of "direct[s]" from *Webster's Third New International Dictionary* 640 (1969), the Court of Appeals concluded that the word "directs" in RCW 9A.72.160 means that a "threat must be made with the intention or knowledge that it will reach the 'particular destination or object in view', i.e., the judge." The court stated that "[a]ny other interpretation would contradict the common understanding of 'directs' and would not promote the statute's purpose of punishing those who seek to intimidate a judicial officer."
>
> . . .
>
> In interpreting RCW 9A.72.160(1), we must determine if the Legislature intended the statute require that a threat must be made with the intent or knowledge that it will reach the judge. We hold that RCW 9A.72.160 does not include such a requirement.
>
> We determine that the legislative intent behind RCW 9A.72.160(1) is to protect judges from the threat of harm due by retaliatory acts because of past official actions by a judge. Under the Court of Appeals' interpretation, the scope of RCW 9A.72.160 would not encompass true threats to harm a judge that are made

> without an intent or knowledge that such threats would reach the threatened judge. This result is contrary to the Legislature's intent to protect judges from retaliatory acts. Such a result also negates the effect of the language from subsection (2) of RCW 9A.72.160.
>
> Subsection (2)(a) of RCW 9A.72.160 includes a definition of the word "threat" and subsection (2)(b) incorporates a more expanded definition of threat from RCW 9A.04.110(25) into RCW 9A.72.160. A threat can thus be defined as a communication made *directly or indirectly* with the intent immediately to use force against any person or to cause bodily injury in the future to the threatened person or any other person. RCW 9A.72.160 includes threats communicated in an indirect fashion as well as direct threats. To carry out this legislative intent and realize the proper interpretation of RCW 9A.72.160, the statute must be construed as a whole by incorporating the definition of threat into subsection (1) of the statute. Under this interpretation, whoever threatens a judge, either directly or indirectly, e.g., through a third person, because of an official ruling or decision by that particular judge, is chargeable under RCW 9A.72.160. The threat may ultimately find its way to the judge, but that is irrelevant with regards to the commission of the crime.

[Emphasis by Court; footnotes, some text, some citations omitted]

(2) Sufficiency Of Evidence

The majority's analysis on the sufficiency of the evidence issue is as follows:

> Because we conclude RCW 9A.72.160(1) does not require that the defendant's threat must be made with the intent or knowledge that the threat reach the judge, no evidence is required to prove such intent. Therefore, the elements required to be proven under RCW 9A.72.160(1) are: (1) that a person directs a threat, either directly or indirectly; (2) to a judge; and (3) because of a ruling or decision by that judge in any official proceeding.
>
> In the present case, the record supports the trial court's finding that these elements were present. The elements are established by Hansen's statement to Youtz that he was going to "get a gun and blow [the judge] away." This satisfies both the first element, as it was a threatening statement made indirectly, i.e., to a third party, and the second element, since the judge was one of the objects of the threat. The third element is proven by the fact that Hansen made the threat because of Judge Dixon's earlier official action when Hansen was convicted of a felony. Viewing the evidence most favorably to the prosecution, a rational trier of fact could find all the elements of RCW 9A.72.160(1) beyond a reasonable doubt. Therefore, we conclude there was sufficient evidence introduced at trial to prove that Hansen was guilty of intimidating a judge under RCW 9A.72.160.

(3) Attorney-Client Privilege

The majority states two reasons for rejecting Hansen's attorney-client privilege argument. First, the majority declares that the test for the existence of an attorney-client privilege is an objective one, and under that test Hansen could not reasonably have believed that Youtz was his attorney

when Hansen made his statement to Youtz about killing the judge and others.

Second, the majority declares that even where an attorney-client relationship exists, the privilege generally does not apply to bar an attorney's testimony about a client's expressed intent to commit a crime in the future. Indeed, the majority opinion declares that there was a duty of the attorney in this case to tell the judge about the threat. The Court's analysis on this point is in part as follows:

> To decide this case, we must determine whether an attorney has an affirmative duty to warn judges of true threats made by his or her client or by third parties. Whether a threat is a true or real threat is based on whether the attorney has a reasonable belief that the threat is real. We hold that attorneys, as officers of the court, have a duty to warn of true threats to harm members of the judiciary communicated to them by clients or by third parties.
>
> We recognize the Court of Appeals in Hawkins v. King Cy., 24 Wn. App. 338 (1979) declined to find a common law duty on the part of an attorney to warn of a client's intent to inflict serious injury on a third person. Hawkins is distinguishable from the present case. In Hawkins, the threatened third party had notice of the potential danger. In the present case, Hansen threatened a judge who was unaware of the possible danger. We conclude that attorneys, as officers of the court, have a duty to warn of true threats to harm a judge made by a client or a third party when the attorney has a reasonable belief that such threats are real. Youtz followed this duty by warning Judge Dixon of Hansen's threat.

LED EDITOR'S COMMENT: The majority's view that, where a threat is based on a judge's past actions, the crime of "intimidating a judge" does not require proof of intent that the threat be communicated to the judge, appears to support an identical interpretation of the crimes of "intimidating a witness" (RCW 9A.72.110) and "intimidating a juror" (RCW 9A.72.130) where the threat, as here, is based on past actions by the person threatened. Note also State v. Phillips, 53 Wn. App. 533 (Div. II, 1989) May '89 LED:18 (holding that RCW 9A.36.090 -- "threats against Governor" -- does not require that those threats be communicated to the Governor.)

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **LIPS NOT AN "INTIMATE PART" FOR PURPOSES OF INDECENT LIBERTIES PROSECUTION** -- In State v. R.P., 122 Wn.2d 735 (1993) the State Supreme Court issues a brief, per curiam opinion reversing a juvenile's conviction for indecent liberties. In its entirety, the majority opinion is as follows:

> R.P. was charged and convicted in juvenile court on two counts of indecent liberties arising from two separate incidents involving a female junior high school classmate. His petition for review relates only to the first count, and argues that there was insufficient evidence that R.P. engaged in sexual contact. This count arose from an incident on or about March 26, 1991, in which R.P. allegedly picked up, hugged and kissed his classmate after track practice. During the course of events, he eventually placed what is commonly referred to as a "hickey" or

"passion mark" on her right neck area.

We affirm that the Court of Appeals decision in all respects but one. After examining the record and the facts of this case, we find that there was insufficient evidence of sexual contact to sustain count 1 (indecent liberties). We reverse R.P.'s conviction on that count.

Three justices join in a dissenting opinion which reads in its entirety:

In reviewing this record, as we must, in light most favorable to the prosecution, I am unable to conclude that there was insufficient evidence to find each element of indecent liberties. For that reason I dissent.

The trial court here found that this *second* sexual encounter with a young girl occurred after track practice at a junior high school. The victim and the defendant were waiting for their respective rides when the defendant picked the girl up against her will and placed her down in an area where he hugged and kissed her and eventually gave her a "hickey" on her neck. The defendant was restraining the girl during this time. The hickey was visible for more than 1 week.

A person is guilty of the crime of indecent liberties

> when he knowingly causes another person who is not his spouse to have sexual contact with him or another:
> (a) By forcible compulsion; . . .

RCW 9A.44.010(10(a).

> "Sexual contact" is defined as
>
> any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

RCW 9A.44.010(2).

The defendant here challenged the trial judge's determination that defendant's lips sucking upon the victim's neck so as to result in a hickey constituted sexual contact.

The determination of which anatomical parts other than genitalia and breasts are "intimate' is a question to be resolved by the trier of fact. In re Adams, 24 Wn. App. 517 (1979) [Jan. '80 LED:03]. The court in Adams held that hips are a sufficiently intimate part of the anatomy that nonconsensual touching of them is prohibited -- particularly if the touching is incidental to other activities which are intended to promote sexual gratification of the actor.

I agree with the trial court in this case that defendant's act of holding the victim down against her will, kissing her, hugging her and then sucking a hickey onto her neck was sexual contact.

For that reason, I dissent.

[Some citations omitted]

Result: reversal of Court of Appeals' affirmance [see 67 Wn. App. 663 (Div. I, 1993) March '93 LED:19] of one of a juvenile's two adjudications for indecent liberties; the other indecent liberties adjudication is affirmed.

LED EDITOR'S COMMENT:

The majority opinion is not very illuminating, but we read this opinion as precluding the reading the Court of Appeals gave "intimate parts." See March '93 LED at 19. Accordingly, we believe the lips of the mouth are not an "intimate part" for purposes of the indecent liberties statute.

(2) **BLOOD SAMPLE MAY BE OBTAINED WITH SEARCH WARRANT IN NON-EXIGENT CIRCUMSTANCES; NO ADVERSARIAL HEARING REQUIRED --** In State v. Kalakosky, 121 Wn.2d 525 (1993) the Supreme Court rejects defendant's argument that allowing police who suspected him of rape to use a search warrant to obtain his blood for forensic testing in non-exigent circumstances did not adequately protect his rights as the subject of the warrant. Defendant argued that there should have been a prior adversarial hearing before the warrant was issued. The Court's analysis in part is as follows:

> In Schmerber v. California, 384 U.S. 757 (1966), the Court held that a suspect's blood can be taken *even without a warrant* if exigent circumstances exist. The Court in Schmerber explained that: the taking of blood is commonplace, the quantity taken is minimal and the procedure involves virtually no risk, trauma or pain; the privilege against incrimination is not violated as the evidence is not testimonial or communicative in nature; and there was no violation of the Sixth Amendment right to counsel caused by taking a blood sample in that case.
>
> Since blood tests are not testimonial, defendant's Fifth Amendment argument is without merit. In regard to defendant's right to counsel argument, it is firmly established that the right to counsel under the Sixth Amendment and under Const. art. 1, § 22 (amend. 10) attaches only at or after initiation of formal charges. Additionally, the taking of nontestimonial physical evidence is not usually a critical stage at which the right to counsel attaches. Therefore, defendant's Sixth Amendment argument is also without merit.
>
> The question remains whether a warrant is sufficient to allow the taking of the arrestee's blood under the Fourth Amendment. The taking of blood samples is a search for Fourth Amendment purposes. Generally, neither the Fourth Amendment nor the state constitution requires that the application for a search warrant be converted into an adversarial proceeding or one held upon notice; rather, it is an ex parte proceeding. The narrower question is whether there is something about the taking of a suspect's blood which requires more than a magistrate's independent determination of probable cause. We conclude there is not.
>
> . . . In Winston v. Lee, 470 U.S. 753 (1985)**[June '85 LED:03]**, the [United States

> Supreme] Court found the State's showing was inadequate to allow removal of a bullet from a suspect's chest because the procedure involved medical risks and the prosecution already had other evidence. Winston distinguished such major surgery from such minor intrusions as the taking of blood samples. Winston expressly left open the question whether an adversarial hearing, which it characterized as "special procedural protection", is required before authorization of such an invasive procedure as surgery. In light of this rationale, it is highly unlikely the Court would require an adversarial proceeding for such a minor intrusion as a blood test. The Court's discussion of blood tests in Schmerber supports this conclusion.
>
> Washington case law has focused on the existence of probable cause when considering the propriety of warrants authorizing the taking of blood samples. Several other jurisdictions have rejected the argument that notice to defense counsel is necessary prior to issuance of a warrant to obtain a blood sample from a defendant.
>
> Given the normal ex parte nature of search warrant applications, the authority supporting the conclusion that probable cause is a proper criterion for judicial authorization of a blood sample, and the fact that the Supreme Court has found blood tests to be a very minimal intrusion, we conclude that neither notice nor an adversarial hearing are constitutionally mandated prior to the issuance of a search warrant to obtain a blood sample from a suspect. Since probable cause is the proper determination for such a search, little is to be availed by allowing a contested hearing. In any event, if the magistrate's determination of probable cause is not subsequently upheld, the evidence will be suppressed.
>
> We therefore hold that the trial court was correct in denying the motion to suppress evidence derived form testing blood samples taken from the defendant.

Result: Spokane County Superior Court convictions for rape (four counts) and attempted rape affirmed.

LED EDITOR'S NOTE: On two other issues, the Supreme Court holds: (1) that DNA evidence linking defendant to one of the rapes was properly admitted by the trial court, and (2) that the trial court did not abuse its discretion in declining to hold an in camera hearing to review qualifiedly privileged rape crisis center records (see RCW 70.125.065).

(3) **UNDER EVIDENCE RULE 608(a), EVIDENCE REGARDING REPUTATION FOR VERACITY IN THE BUSINESS COMMUNITY ADMISSIBLE AS EVIDENCE OF "REPUTATION IN THE COMMUNITY" --** In State v. Land, 121 Wn.2d 494 (1993) the Washington State Supreme Court declares its ruling in part as follows:

> For purposes of Evidence Rule 608(a), which permits the admission of reputation evidence of a witness whose character for truthfulness has been attacked, the witness's reputation for veracity may be derived from any relevant community, including the community in which the witness works. The community is not limited to the community in which the witness resides. A 1963 Supreme Court precedent, State v. Swenson, 62 Wn.2d 259, is overruled insofar as it is inconsistent.

Result: Whatcom County Superior Court convictions for second degree rape of a child and second degree child molestation affirmed.

LED EDITOR'S NOTE: In many circumstances, reputation evidence will not be admissible. We will not attempt to explain in this brief entry the threshold standard for admissibility of such evidence. Rather, we include the entry solely for police investigators to keep in mind that the "community" where one's reputation for truth-telling or lying may be significant extends to non-residential communities such as business or school communities.

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WASHINGTON STATE COURT OF APPEALS

EVIDENCE LAW RULING -- MEDICAL DIAGNOSIS HEARSAY EXCEPTION ALLOWS TESTIMONY RE CHILD'S IDENTIFICATION OF ASSAILANT TO TREATING DOCTOR

State v. Ashcraft, 71 Wn. App. 444 (Div. I, 1993)

Facts: (Excerpted from Court of Appeals' opinion)

> Appellant became the custodian of a child, J., in November 1987. J. was almost 3 when she came to live with the appellant. Before October 1989, reports of possible child abuse with respect to J. were filed with Child Protective Services (CPS). No injuries were found when these reports were investigated. Instead, the caseworker found the appellant's relationship with J. to be very positive and found the appellant very cooperative during each investigation.
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> On October 15, 1989, Pamela Randles, the appellant's son's girlfriend, who was babysitting J., called the police and reported bruise marks on J. The police officers found bruises and decided to take J. to Children's Hospital for further investigation.
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> The examination at Children's Hospital was conducted by Drs. Kallas and Brownstein. Both doctors noted bruises on J.'s body at the time of examination, some of which were over 3 days old. The doctors also noted bite marks consistent with the size of a adult mouth. At trial, Dr. Brownstein opined that the location of the bruises and their appearance were not consistent with accidental trauma and could only have resulted from being hit with an object. Dr. Brownstein also identified certain bruise marks which were consistent with being hit by a shoe that had a rigid sole.
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> Dr. Brownstein also indicated that he found some bruises which were consistent with being hit with a cord or rope and others which were consistent with being hit with a belt or ruler. When Dr. Brownstein asked J. if anyone had hurt her, she replied, "Yes, Mommy did." J. also told Dr. Kallas that "My mama did it." Both doctors concluded that J.'s injuries had been caused by child abuse.
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> After the examination at Children's Hospital, J. was removed from the appellant's home, and an investigation was started of the appellant. After she was contacted by the police at her place of employment, the appellant gave a written statement to

the police, saying that she had only disciplined the child with her hand on the child's buttocks and that, when she had bathed the child 2 nights before the medical examination, she had noticed no bruises.

After a further investigation, appellant was arrested and charged with three counts of assault in the second degree, in violation of RCW 9A.36.021(1)(a). The charges asserted that appellant was guilty of assaulting J. with a stick, a shoe and a belt, respectively, between November 1, 1987, and October 15, 1989.

Proceedings:

Ashcraft was tried before a jury and convicted of two counts of second degree assault and one count of simple assault (simple assault is now categorized as fourth degree assault).

ISSUE AND RULING: Was the treating doctor's testimony that the child told him that "mama" had been the one who assaulted her admissible under Evidence Rule 803(a)(4) which allows hearsay testimony as to statements made for purposes of medical diagnosis or treatment under certain circumstances? (ANSWER: Yes, because: (a) the identification information was necessary for treatment, (b) the child was very young, and (c) there was corroborating evidence.) Result: for reasons not addressed here (jury instruction error) the King County Superior Court convictions are reversed, and the case is remanded for re-trial.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

ER 803(a)(4) allows the admittance of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. Normally, such testimony is not admissible if it identifies the perpetrator of a crime, but an exception has arisen to this rule when the victim is a child. State v. Butler, 53 Wn. App. 214, 766 P.2d 505, review denied, 112 Wn.2d 1014 (1989).

In Butler, this court examined at length the purposes of ER 803(a)(4) and the times when hearsay evidence concerning the identity of the perpetrator of a crime can be admitted when the victim is a child. This court ruled that such statements could be admitted as part of the doctor's testimony regarding medical treatment if the information was necessary for diagnosis and treatment. In ruling that the incriminating identification was necessary for diagnosis and treatment in that case, we reasoned that, in abuse cases, it is important for the child to identify the abuser in seeking treatment because the child may have possible psychological injuries and also may be in further danger, due to the continued presence of the abuser in the child's home.

Similarly, in the present case, the victim lived in the accused's home. The child had been determined to be the victim of probable abuse, raising questions of possible psychological injuries, as well as questions with respect to her safety. Therefore, as in Butler, J.'s identification was necessary to allow for her proper diagnosis and treatment.

Appellant contends there is an additional requirement for admittance of perpetrator identification, that being that the child *herself* must understand that such identification will be admissible under this rule. In United States v. Renville, 779

F.2d 430 (8th Cir. 1985), a case cited by appellant, the Eighth Circuit indicated that, in order for perpetrator hearsay to be admitted under the medical treatment hearsay exception, it must be necessary for treatment *and* also must have been relayed by the declarant with the understanding that it was to promote treatment. This is to ensure the reliability of the information by making sure the patient recognizes his or her self-interest in being truthful.

However, in Butler, this court distinguished Renville, finding that, when a declarant is too young to appreciate that information is being given to promote treatment, then that child's testimony may still be considered reliable because at a very young age a child would have no reason to fabricate the nature of her injuries. We also held that the fact that there is no apparent appreciation of the need to give information to promote treatment is less important where there is corroborative evidence.

Therefore, it is not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability. Such indicia are present here. Although J. probably did not understand that her statement would aid in her treatment, because of her young age she appeared to have no reason to fabricate the nature of her injuries, just as the child in Butler had no reason for fabrication.

Moreover, there was strong corroborating evidence supporting J.'s statements. The appellant made a sworn statement that she had bathed J. two nights earlier and had noticed no bruises on her body. However, the treating physicians testified that at least some of the bruises on J.'s body had to have been over 3 days old. When the accused gives a story regarding the abuse which is implausible, this can be considered as corroborating evidence of the child's accusatory statements. Therefore, we hold that the trial court correctly admitted J.'s statements to her treating physicians.

[Footnotes, some citations omitted]

LED EDITOR'S NOTES:

1. HEARSAY EXCEPTION MAY APPLY TO SOME NON-CHILD ASSAULT SITUATIONS AS WELL -- While the Court of Appeals' discussion in Ashcraft appears to limit its ruling under ER 803(a)(4) to cases involving hearsay testimony from doctors regarding child victims only, recent cases from other jurisdictions extend the "medical treatment hearsay exception" to allow assailant-identification hearsay testimony from treating doctors in domestic violence cases involving adult victims as well. See e.g., U.S. v. Joe, 54 CrL 1180(10th Cir., 1993).

2. THIS DECISION DID NOT ADDRESS THE CHILD SEXUAL ABUSE HEARSAY STATUTE (RCW 9A.44.120) OR THE EXCITED UTTERANCE (ER 803(a)(2)) EXCEPTION -- Two more hearsay exceptions (other than the medical treatment exception addressed in this case) under which child victim hearsay may be admissible are: (1) the child sexual abuse hearsay statute, RCW 9A.44.120 (which wouldn't have applied in Ashcraft because the abuse here was not sexual in nature), and (2) the excited utterance exception, ER 803(a)(2) (which apparently wouldn't have applied under the Ashcraft facts because the statement

was not uttered by the child while under the stress of excitement caused: (a) by the assault or (b) by seeing the assailant sometime after the assault.) See State v. Chapin, 118 Wn.2d 681 (1992) March '93 LED:06; State v. Strauss, 119 Wn.2d 401 (1992) Feb. '93 LED:05; and State v. Bryant, 65 Wn. App. 428 (Div. I, 1992) Feb. '93 LED:19 for recent cases with detailed discussion of the "excited utterance" hearsay exception.

DESTRUCTION OF PROPERTY WITH MALICE TOWARD LESSEE, NOT OWNER, OF PROPERTY IS SUFFICIENT EVIDENCE TO SUPPORT MALICIOUS MISCHIEF CONVICTION

State v. VanValkenburgh, 70 Wn. App. 812 (Div. III, 1993)

Facts and Proceedings: (Excerpted from Court of Appeals' opinion)

> At approximately 11:30 p.m. on July 25, 1991, two volunteers with the Spokane Police Department saw Gerald E. VanValkenburgh break windows in a building located at West 1608 Boone. The building was owned by Walt Worthy and leased to the Washington State Office of Support Enforcement.
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> Mr. VanValkenburgh was arrested and charged with second degree malicious mischief. His trial commenced on December 18, 1991.
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> At trial, Mr. VanValkenburgh testified he had two children, aged 2 1/2 and 7 1/2, who lived with their respective mothers. He had not seen either child for 2 years and had never paid child support. Several years earlier, his property had been levied on by the Office of Support Enforcement, an action he contended was illegal. According to Mr. VanValkenburgh, it was against his religious principles to pay child support.
>
> Mr. VanValkenburgh did not deny breaking the windows. He said he did it for the public good, out of agony, and as a means "to get into court". The jury found him guilty as charged.

ISSUE AND RULINGS: Was there sufficient evidence of malice to support defendant's conviction for malicious mischief? (ANSWER: Yes) Result: Spokane County Superior Court conviction for second degree malicious mischief affirmed.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

> Mr. VanValkenburgh . . . contends his conviction must be reversed because the evidence was insufficient to prove he maliciously caused over $250 damage to the property of the Office of Support Enforcement. He contends there is no evidence to show he either knew or had any malice toward Walt Worthy, the owner of the property, and since the evidence only showed malice toward support enforcement, there was a complete failure of theory and proof to support his conviction. The evidence is that Walt Worthy, rather than support enforcement, paid to have the damage repaired.
>
> To constitute malicious mischief, the defendant must act knowingly and with malice. RCW 9A.48.080. Malice imports an evil intent, wish, or design to vex,

> annoy, or injure another person and may be inferred from an act done in willful disregard of another's rights or an act wrongfully done without just cause or excuse. RCW 9A.04.110(12). A person acts knowingly if he is aware of facts or circumstances or results described as a crime. RCW 9A.08.010(1)(b)(i). A jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists.
>
> The evidence clearly proved knowing conduct and malice by Mr. VanValkenburgh toward support enforcement. Since support enforcement, as lessee, had a property interest in the building, and Mr. VanValkenburgh knowingly and with malice damaged it in an amount exceeding $250, the evidence was sufficient to support his conviction. The term "property of another" in RCW 9A.48.080 is broader than a fee ownership interest.
>
> Even if we were to conclude that intent to harm the owner of damaged property is required, the doctrine of transferred intent likewise supports Mr. VanValkenburgh's conviction. Intent against any person generally may be transferred to another if that other is injured.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **IMPLIED CONSENT WARNING BECAME CONFUSING WHERE OFFICER SAID LICENSE "PROBABLY" WOULD BE SUSPENDED** -- In Mairs v. DOL, 70 Wn. App. 541 (Div. I, 1993) the Court of Appeals finds prejudicial fault in a police officer's response to a DWI arrestee's question about the implied consent warnings. Having just given the proper warnings, the officer responded to the arrestee's question about what the warnings meant by saying her license "probably" would be suspended if she refused the test. Citing Cooper v. DOL, 61 Wn. App. 525 (1991) the Court of Appeals rules that use of the word, "probably," instead of the word, "definitely," in this context made the warning confusing and therefore improper. Result: Skagit County Superior Court order reversing a DOL license revocation affirmed.

(2) **ADVISING DWI ARRESTEE THAT REFUSAL OF BREATH TEST "MAY" BE USED AGAINST HIM HELD LAWFUL** -- In Frank v. Department of Licensing, 71 Wn. App. 585 (Div. III, 1993) the Court of Appeals reviews a challenge to a driver's license revocation which the Court describes as follows:

> Roy J. Frank was arrested for operating a motor vehicle while under the influence of intoxicants. He was advised of his rights under the implied consent statute, RCW 46.20.308, and told that his "refusal to take this [breath] test may be used in a criminal trial." Mr. Frank refused the test and his driver's license was revoked by the Department of Licensing. The Superior Court affirmed the Department's order, following a trial de novo. . . .
>
> Mr. Frank contends that the use of the word "may" in the warning he received was inaccurate because RCW 46.61.517 and State v. Long, 113 Wn.2d 266, 778 P.2d

> 1027 (1989) mandate the admissibility of refusal evidence in all cases. He asserts that he would have been more inclined to take the breath test had he been advised that his refusal "will" or "shall" be used in evidence at a criminal trial.

[Some text, one footnote omitted]

The Court of Appeals rejects Frank's challenge, noting first that the officer's use of the word "may" was mandated by the controlling statute, RCW 46.20.308(2). The Court then goes on to offer additional reasons for upholding the revocation:

> The State properly relies on Gonzales v. Department of Licensing, 112 Wn.2d 890 (1989). There, the arresting officer advised the driver that the refusal to take a breath test *shall* be used against him in a criminal trial. The driver contended that the implied consent warning was inaccurate because "shall" was used instead of "may". The court agreed that the use of the word "shall" was improper because "[t]he accurate form of the implied consent warning is that a refusal to take the Breathalyzer test 'may' be used in a criminal trial."
>
> Further, even though refusal evidence is relevant and fully admissible under Long, a prosecutor may decide, in his or her discretion, not to introduce the evidence. There may, for instance, be a procedural defect. In addition, there may be particular reasons which require the trial court to exclude the refusal evidence.

[One citation, one footnote omitted]

Result: Spokane County Superior Court affirmance of DOL driver's license revocation affirmed.

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NOTE

DOL MEMO CORRECTS MOTORCYCLE OPERATORS MANUAL

The following memorandum was received in our offices on December 22, 1993. The memo is from Don Mapp, Coordinator of DOL's Washington Motorcycle Safety Program. It is directed to "all law enforcement agencies" for distribution to all officers. Mr. Mapp's memo corrects the Motorcycle Operators Manual as follows:

> On page IV of the July, 1993, edition of the Washington State Motorcycle Operators Manual under **EQUIPMENT REQUIREMENTS**, third paragraph, it states "Raising the handlebars to a level more than **25** inches (38.1 centimeters) above the level of the seat is also against the law."
>
> The **25 inches** should read **15 inches** (38.1 centimeters) as per RCW 46.61.611.
>
> We apologize for any inconvenience this may have caused. Please make a notation in your motorcycle operators manual of this change. We will be placing inserts noting the correction in the guides distributed at our local offices.

We have also notified motorcycle clubs/organizations and dealers regarding this correction.

Thank you for your cooperation. If you have any questions please contact me [Don Mapp] at (206) 753-2487.

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NEXT MONTH

The March 1993 LED will include an entry on U.S. v. Good, 54 CrL 2009 (1993). In Good the U.S. Supreme Court rules, 5-4, that the U.S. Constitution's due process clause requires the government to provide notice and a hearing before seizing real property under drug forfeiture laws. Good does not require prior notice and hearing where personal property is seized under forfeiture laws, and it does not change burdens or standards of proof under forfeiture statutes.

We will also have an entry on State v. McGee, 122 Wn.2d 783 (1993). In McGee, the State Supreme Court holds that where a prosecution is based on possession of drugs "with intent to deliver" those drugs, the school zone sentence enhancement provision of the controlled substances statute does not require proof of intent that delivery be effected within the school zone. The Court has held that the shool zone sentence enhancement provision requires only proof that one was in possession of drugs within a school zone with intent to deliver the drugs anywhere.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.